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No. 10-1090

IN THE

Supreme Court of the United States

MEDIOSTREAM, INC.,
Petitioner,

v.

ACER AMERICA CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF

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REPLY BRIEF

I. The question of mandamus review has been squarely and cleanly joined.

Petitioner asserted that the district court used the proper legal test to decide the 28 U.S.C. § 1404(a) motion, so the decision below is an appellate reweighing of facts. Pet. 5. Respondents conceded that the decision below reanalyzed the facts. Opp. 17. On brief below, Petitioner asserted that mandamus is permissible only when "it is clear that the facts and circumstances are without any basis for a judgment of discretion." C.A. Brief at 12. Petitioner's positions here and below are identical. *McGraw-Edison Co. v. Van Pelt*, 350 F.2d 361, 363 (8th Cir. 1965) (*en banc*) ("Where basis exists for judgment of discretion, the appellate court may not substitute its

own discretion for that of the district court.") Petitioner has consistently claimed that reversal of the district court's § 1404(a) decision is not permissible under the All Writs Act, 28 U.S.C. § 1651. *See Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 893 (2010).

The Federal Circuit certainly had opportunity to address the standard of review.[1] Mandamus could not have issued under a standard reserving the writ for cases where "it is clear that the facts and circumstances are without any basis for a judgment of discretion." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 n. 7 (5th Cir. 2008) *cert. denied*, 129 S.Ct. 1336 (2009) *citing McGraw-Edison Co.*, 350 F.2d at, 363. The decision below, however, rests on words of discretion such as "insignificant," and "unreasonable." Pet. App. 6a, 7a. Further, the decision below ignored delay, which is a substantive factor in the § 1404(a) analysis, and can even be the district court's sole basis for denying transfer. *See In re Wyeth*, 2010 WL

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[1] In addition to the opportunity presented below, the Federal Circuit has repeatedly declined requests to address the standard *en banc*. *In re TS Tech, USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008) (reh'g *en banc* denied Feb. 6, 2009) (Pet. for reh'g at 7: "The errors found here concern how the district court applied the venue transfer factors as opposed to whether the district court was applying the correct factors. Once mandamus petitions enter this discretionary realm, they open the door for an onslaught ...."); *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009) (reh'g *en banc* denied Aug. 10, 2009); *In re Zimmer Holdings, Inc.*, 609 F.3d 1378 (Fed. Cir. 2010) (reh'g *en banc* denied Aug. 20, 2010) (Pet. for reh'g at 13: "Defying precedent, the panel substituted its discretion for the trial court's.") In any event, a petition for rehearing is not required. Fed. R. App. P 40(a); Sup. Ct. R. 13(3).

5376518, *2 (Fed. Cir. 2010) (unpublished).[2] There was basis for a district court judgment of discretion.

Respondents' waiver argument inadvertently gets to the rub of the matter. Respondents presume that "clear abuse of discretion" permitting reweighing of facts is the "indisputably" correct understanding of the term. Opp. 2. That presumption is at odds with the Fifth Circuit's explanation of "clear abuse." *In re Volkswagen of Am., Inc.*, 545 F.3d at 312 ("we stress – in no case will we replace a district court's exercise of discretion with our own.")

II. "Clear abuse of discretion" conflicts with "clear and indisputable right to the writ."

Though Respondents cite *Bankers Life* as foundational authority for broad "clear abuse" review, in actuality this Court refused to review the district court decision for purported error, lest "mandamus ... be enlarged to actually control the decision of the trial court ...." Opp. 14; *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 382-83 (1953).[3] *Bankers Life*

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[2] Regarding delay, Respondents imply that their belated second motion for reconsideration was justified by new Federal Circuit cases. Opp. 9. When giving guidance on whether its recent cases constitute new grounds for a transfer motion, the Federal Circuit has declared: "[A] decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation and that the effect is not that the former decision was bad law but that it never was the law." *In re Oracle Corp.*, 399 Fed.Appx. 587, 589 (Fed. Cir. 2010) (internal citation omitted). This is inconsistent with Respondents' position that the Federal Circuit's torrent of mandamuses constitutes dutiful application of long-settled Supreme Court precedent. Opp. 26.

[3] This Court later held that mandamus review of the facts was impermissible *de novo* review. *Platt v. Minnesota Min. & Mfg. Co.*, 376 U.S. 240, 245 (1964).

held that the party seeking mandamus must establish that the right to the writ is "clear and indisputable." *Id.*, at 384. The case was not decided on "clear abuse" grounds, and perhaps should not have been decided at all. *Id.*, at 387 (Justices Frankfurter, Jackson, and Minton dissenting that certiorari had been improvidently granted and that the decision was "not even useful as dicta for future guidance ....")

Even so, "clear abuse of discretion" became an oft-repeated but seldom used feature of this Court's All Writs Act jurisprudence. "Clear abuse" did provide the rule of decision in the seminal "supervisory" mandamus case. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309 (1957).[4] However this Court soon cautioned that "Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98 n. 6, 88 S.Ct. 269, 275 n. 6, 19 L.Ed.2d 305 (1967). The uncertain nature of "clear abuse of discretion" was a fault line dividing this Court in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 98 S.Ct. 2552 (1978) (plurality opinion). The plurality reversed a grant of mandamus, holding that "[w]here a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Id.*, at 666-7 (citations omitted). The plurality noted *La Buy*

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[4] In a case that is both ignored and unreversed, the Federal Circuit declared that supervisory authority was the exclusive province of the regional circuits, and aid-of-jurisdiction was limited because all patent appeals go to the Federal Circuit. *In re Innotron Diagnostics*, 800 F.2d 1077, 1083-4 (Fed.Cir.1986).

as a rare, perhaps isolated holding, and echoed the prior caution against review for mere error. *Id.*, at 667, n. 7. The dissenters, however, treated "clear abuse" as one of two independent prongs that would support the appellate court's issuance of the writ. *Id.*, at 676.

By 1976, however, this Court had synthesized mandamus jurisprudence, enumerating three factors guiding consideration of the writ. *Kerr v. United States District Court for Northern District of California*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976). The three-factor analysis prevails today. *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004)

"Clear abuse of discretion" is not one of the factors. *Id.*, at 380-81. The phrase has become a free-floating description of mandamus jurisprudence that serves little remaining purpose besides sowing confusion. As this Court has said concerning another question-begging description of mandamus review, clear abuse of discretion "states the standard but does not decide this or any other particular case." *Will v. Calvert Fire Ins. Co.*, 437 U.S. at 661-2.

One aspect of *Bankers Life* remains vital: "clear and indisputable" right to the writ. *Bankers Life*, 346 U.S. at 384. That requirement is the second part of the three-factor analysis. *Cheney*, 542 U.S. at 381. This Court has reaffirmed that "[w]here a matter is committed to the discretion of the trial court, it cannot be said that a litigant's right to a particular result is clear and indisputable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980) (per curiam). The analysis of § 1404(a) convenience and interest-of-justice

factors is committed to the district court's discretion. *Caldwell v. Palmetto State Sav. Bank*, 811 F.2d 916, 919 (5th Cir.1987).[5]

III. After eight, now ten, grants of mandamus regarding § 1404(a) the court below has exceeded any possible *Schlagenhauf* authority.

Lending urgency to this Petition, the Federal Circuit has granted two additional § 1404(a) writs. *In re Morgan Stanley*, 2011 WL 1338830 (Fed. Cir. 2011); *In re Verizon Business Network Services, Inc.*, 2011 WL 1026623 (Fed. Cir. 2011).

There is a narrow exception permitting otherwise impermissible factual mandamus review on matters of first impression. *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)(involving first reported instance of Fed. R. Civ. P. 35 physical examination of a defendant). Significantly, this Court declared that rulemaking review could only be invoked once; having set guidelines, it would be improper to entertain any future mandamus asserting district court error in applying the guidelines. *Id.*, at 112, *citing Bankers Life & Casualty Co.*, 346 U.S., at 382.

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[5] Respondents' resort to regular appeals cases is misplaced. Opp. 16-7, *citing Koon v. United States*, 518 U.S. 81 (1996); *Cooter v. Gell & Hartmarx Corp.*, 496 U.S. 384 (1990). Respondents cite no case of this Court holding that the appellate standard supplies, or even informs, the mandamus standard. Likewise misplaced is Respondents' implication that the *Volkswagen* dissenters acknowledged the validity of an expansive view of "clear abuse." *Compare* Opp. 25 with *In re Volkswagen*, 545 F.3d at 320-21.

Schlagenhauf review is further confined to matters where the reviewing court bears special responsibility. *Cheney*, 542 U.S. at 391. General venue principles are neither a matter of first impression, nor a matter of special Federal Circuit responsibility. As the Federal Circuit itself has held, supervisory guidance on non-patent matters is properly left to the regional circuits. *In re Innotron*, 800 F.2d at 1083-84. But, under its current practice of frequent supervisory mandamuses, the Federal Circuit runs the risk of creating or exacerbating circuit splits on non-patent substantive law. *See In re Affymetrix, Inc.*, 2010 WL 1525010 *3, n.3 (Fed. Cir. 2010) (unpublished) (declaring Fifth Circuit § 1404(a) precedent more favorable to transfer than that of the Seventh Circuit.)

The Federal Circuit, while never expressly invoking *Schlagenhauf* authority, has repeatedly issued new § 1404(a) rules. With one such rule, the Federal Circuit stripped the district court's ability to weigh the relative importance of witnesses. *In re Genentech, Inc.*, 566 F.3d 1343-4. The court below, however, preserves its own ability to conduct such weighing. Pet. App. 6a. The Fifth Circuit presumption that inconvenience increases with distance does not apply to witnesses coming from overseas. *In re Genetech*, 566 F.3d at 1344. A district court may not consider its central location. *Id.* Nor may the district court consider the fact that parties now moving for transfer have previously filed their own suits in the district, unless the district court meets the impossible standard of showing that the movant's prior suits involved the "same parties, witnesses, evidence and facts." *Id.*, at 1346; *See also In re Morgan Stanley*, 2011 WL 1338830 at *2, *In re Verizon Business Network Services Inc.*, 2011 WL 1026623

at *2, *In re Vistaprint Ltd.*, 628 F.3d 1342, 1346 (Fed. Cir. 2010; *In re Volkswagen of America, Inc.*, 566 F.3d 1349 (Fed.Cir.2009); *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1382 (Fed.Cir.2010), *In re Google Inc.*, 2011 WL 772875 at *2 (Fed. Cir. 2011); *In re Echostar Corp*, 388 Fed.Appx. 994, 995 (Fed. Cir. 2010) (all giving rules on judicial economy).

Though patent venue is coextensive with personal jurisdiction, and is proper here, the Federal Circuit has not invoked *Schlagenhauf* authority to reconcile § 1404(a) mandamus grants with recent personal jurisdiction holdings. *See, e.g., Patent Rights Protection Group, LLC v. Video Gaming Technologies, Inc.*, 603 F.3d 1364, 1370 (Fed. Cir. 2010) (Michigan and Tennessee companies which attend Nevada trade shows do not face a "particularly onerous" burden defending themselves in Nevada).

Instead, with its most recent rulemaking, the Federal Circuit has condoned delayed justice for individual inventors, university researchers, start-up companies, and companies driven out of the market by anti-competitive practices. *In re Morgan Stanley*, at *3 (Holding that only those with products currently on the market enjoy a presumptive interest in avoiding the delays associated with transfer.) *The sub silentio* eve-of-trial writ granted in favor of Acer, Microsoft and others is now a nationwide and openly-declared rule.

IV. The circuit split has not faded away like an old soldier.

The Fifth Circuit has acknowledged circuit confusion on the mandamus standard. *In re Amy Unknown*, ___ F.3d ___, 2011 WL 988882 * 5, n. 9 (5th Cir. 2011). In a mandamus arising out of the Crime Victims Rights Act ("CVRA"), 18 U.S.C. § 3771, the Fifth Circuit observed that: "our sister circuits are far from united in the standard to be applied." *Id.* That holding has bearing here because "a single mandamus standard reigns in the Fifth Circuit, regardless of the context in which the petition arises." *Id.*, at *5. The Fifth Circuit went on to note that other circuit's CVRA mandamus review was "more amenable" to reversal of the district court than that of the Fifth Circuit. *Id.*, at * 5, n. 9. In short, the circuits are split on what Congress meant when it said that CVRA decisions could be reviewed by mandamus. *Id.*, 18 U.S.C. § 3771(d)(3). The Fifth Circuit granted the writ on the legal question of whether compensation was subject to a proximate cause limiter. *Id.*, at * 5-6. Having resolved the legal issue, the Fifth Circuit remanded, stating that the district court is "best qualified" to conduct the factual analysis of the amount of restitution due. *Id.*, at * 9.

The Third Circuit has not ended the circuit split by endorsing factual reweighing. *Compare* Opp. 21 *with Solomon v. Cont'l Am. Life Ins. Co.*, 472 F.2d 1043, 1046 (3d Cir. 1972) ("[U]nder any standard of review which we might want to invent, the writ would not in this case issue. We refer to the facts at this point only as indicating that the transfer order falls well within any conceivable standard for review on a mandamus petition of a § 1404(a) order."). Likewise, other cases Respondents present as holdings endorsing factual

reweighing were actually mandamus denials. Opp. 20; *In re Pressman-Gutman Co., Inc.*, 459 F.3d 383, 403 (3d Cir. 2006); *In re Wilson*, 451 F.3d 161, 173 (3d Cir. 2006); *Wilderman v. Cooper & Scully, P.C.*, 428 F.3d 474, 478 (3d Cir. 2005); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 384 (3d Cir. 2002); *In re Patenaude*, 210 F.3d 135, 145 (3d Cir. 2000).

Respondents cited only two Third Circuit cases where the writ was granted, but both involved legal questions, not factual reweighing. Opp. 20; *In re U.S.*, 273 F.3d 380, 389 (3d Cir. 2001) (whether trial court had applied the proper burden of proof); *Carteret Sav. Bank, FA v. Shushan*, 919 F.2d 225, 228 (3d Cir.1990) (whether 28 U.S.C. § 1406 transfer can issue where venue is proper, but personal jurisdiction over the defendant is lacking). Far from endorsing factual reweighing, Third Circuit law is still understood to prohibit it: "the government conceded that once the District Court evaluated the factors in light of the appropriate burden, there would be no basis for it to file another mandamus petition." *In re U.S.*, 273 F.3d 389.

Nor has the First Circuit endorsed factual reweighing. *Compare* Opp. 21-2 *with Codex Corp v. Milagro Electronic Corp.* 553 F.2d 735, 739-40 (1st Cir. 1977)("[T]his is not a routine case, nor is it one where we find an abuse of discretion. Rather, it presents a situation, likely to recur, which we believe calls for the development of special principles not previously fully articulated.") *Codex* is not an instance of factual reweighing, but instead is an instance of *Schlagenhauf*-style mandamus rulemaking.

V. Respondents' litany of mandamus cases only serves to highlight the circuit split.

While respondents list the numerous mandamus decisions of the court below, they fail to show that such rapid-fire consideration of the writ comports with First, Third or even Fifth Circuit standards governing its issuance. Respondents' listing of purportedly proper and necessary mandamus decisions of the court below is a distraction of questionable value. The decision below, for example, made no mention of the fact that the eve-of-trial writ was based on transfer motions that were first filed in 2008. Consequently, the decisions of the court below may not be the best source for a complete picture of the facts and circumstances of any particular case. *See, e.g., In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1382 (Fed.Cir.2010) (no mention of defendant's employees the district); *MedIdea LLC v. Zimmer Holdings, Inc.*, 2:09-cv-00258-TJW Dkt. 37-5 (Zimmer website showing names and faces of in-state and in-district employees).

Ultimately, Respondents resort to an "ends justify the means" argument that the district court is willfully disregarding the law. Such charges should not be entertained here because Respondents failed to assert or prove them below. *Will v. United States*, 389 U.S. at 100-104. The changes are unfounded. Even before the recent mandamuses, the statistics show a consistent pattern of the district court "transferring a greater proportion of its patent cases than the federal system as a whole." Janicke, Paul, PATENT VENUE AND CONVENIENCE TRANSFER: NEW WORLD OR SMALL SHIFT? 11 N.C. J.L. & Tech. On. 1 * 20 (2009). Further, Respondents' assumption that they must be sued at their headquarters stands rejected by Congress.

VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir. 1990) *cert. denied*, 499 U.S. 922 (1991).

CONCLUSION

The circuit split remains. Mandamus is supposed to be extraordinary, but has now become routine. Respondents concede that the court below reanalyzed the facts. Therefore the court below could not have issued mandamus under the standard of review of those circuits which prohibit factual reweighing. Petitioner asks that certiorari issue.

Respectfully submitted,

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